

***United States Court of Appeals
for the
District of Columbia Circuit***



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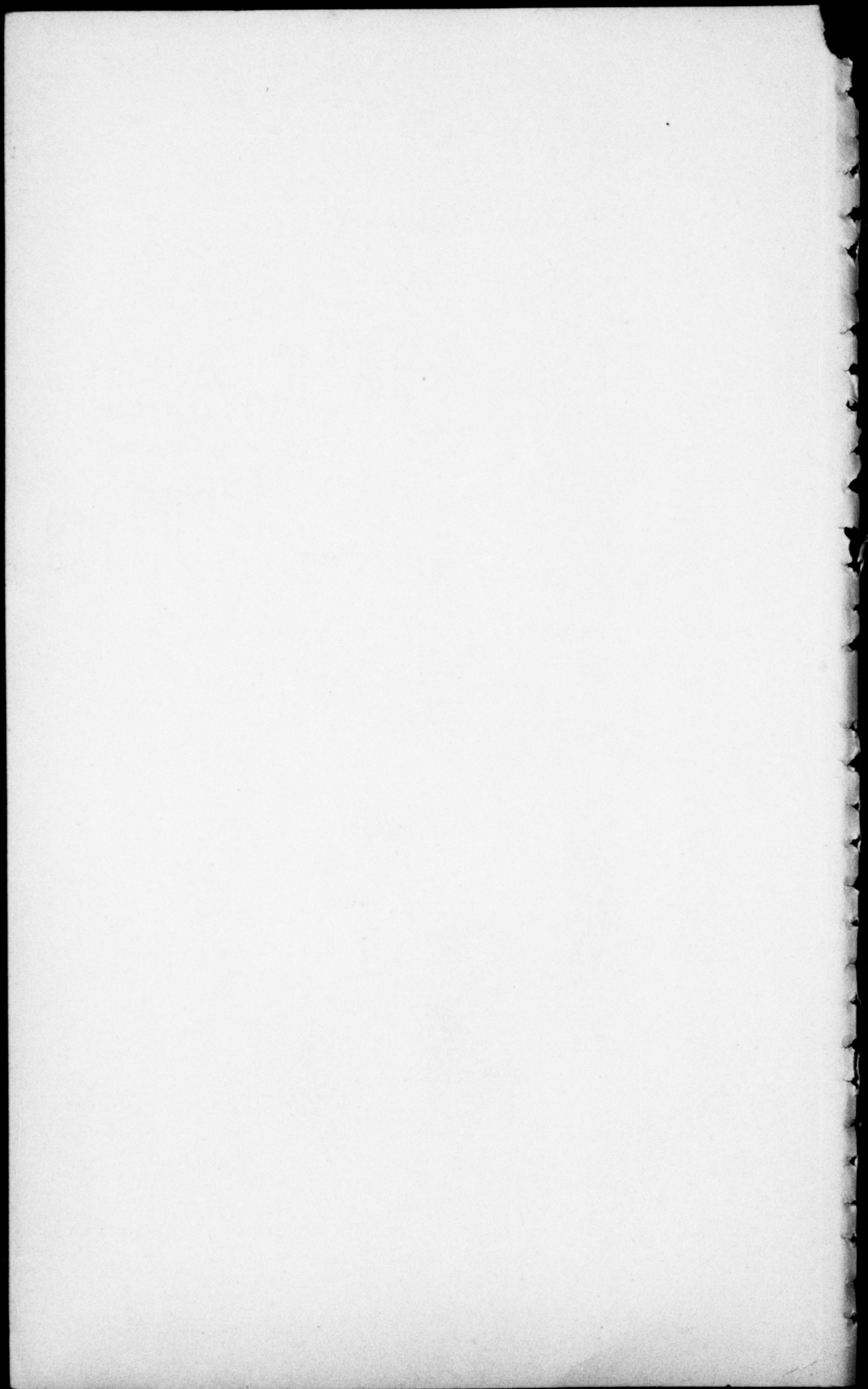
THOMAS H. MILSON, APPELLANT,

vs.

ERNST GERSTENBERG AND MARY H. DEIS, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF PHILIP H. DEIS, APPELLEES.

REPLY BRIEF FOR APPELLANT.

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For the Appellant.



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REPLY BRIEF FOR APPELLANT.

Statement.

At the time of the filing of main brief for the appellant it was not known precisely what the position was of the appellees with respect to the appellant's case, except as disclosed by the opinion of the court below on the motion to direct a verdict; and accordingly the appellant's brief was largely a reply to that opinion. It appears, however, from the appellees' brief that in many respects their contentions go beyond the reasons given by the lower court for its conclusion, and contentions are made which have not been touched upon in the appellant's brief. Accordingly this reply brief is presented.

Although there are four false representations alleged in the declaration as the inducement upon which the appellant acted, of course proof of any one of them, if material, is sufficient.

Yates *vs.* Alden, 41 Barb., 172.

Dashiel *vs.* Harshman, 113 Ia., 283.

People *vs.* Haynes, 11 Wend., 557.

But as it is the contention of the appellant that there was proof of every one of the four alleged false representations, sufficient to require its submission to the jury, it is necessary that each should be considered. They all have been so considered in the appellees' brief and what has been said therein concerning them will be here replied to briefly.

Reply to Appellees' Contention Regarding the Solomon Misrepresentation.

This representation by Deis and Gerstenberg, as testified to by the appellant, was that there was a man named Solomon in Washington that morning ready to pay \$150,000 for a one-third interest in the Deis Pump Company, and they further said appellant would have to decide at once whether he would buy, because Solomon was in town ready to purchase. They stated as a reason why they were willing to sell to appellant for \$35,000 what somebody else was ready to pay \$150,000 for, was that they would rather sell to appellant because he came recommended by Steward, Deis' son-in-law, and Gerstenberg thought a good deal of Steward and stated he would rather see the stock of the company in good hands in this country so that he could devote all of his time to German patents (R., 42). Appellant also offered to testify that while being shown about town by Deis, they happened to enter the lobby of the Willard Hotel, when Deis said to appellant, "Come, we must get out of here quickly, because there is Solomon over there and I don't want him to see you with me, because he came down here to close the transaction and expects to get the interest we are negotiating for with you" (R., 48). According to ap-

pellant's testimony, on leaving the hotel Deis took Milson to see Gerstenberg and in the presence of Milson asked Gerstenberg what he had done with Solomon; to which Gerstenberg then responded that Solomon was mad because Milson had got ahead of him and had left for New York (R., 48). Appellant testified that this representation was one of those which had induced him to make the purchase and that he believed it to be true (R., 56).

Concerning this alleged false representation the lower court held that it was such an unreasonable one that the appellant was not justified in relying upon it, for no reasonable ground was stated why the parties should have thrown away \$115,000 in cash in order to give the plaintiff the preference of buying in (R., 16).

The appellees' contentions now with respect to this representation are as follows:

(1) They deny that the representation was made as alleged and testified to, and claim that the plaintiff's evidence did not prove beyond a reasonable doubt that it was made, as alleged.

(2) They claim that if it was made, and if the proof was sufficient so to show, the appellant by failing to charge Gerstenberg and Deis with their fraud, after he had paid them his money, and for a year and a half after he discovered its falsity, waived his right to complain of their fraud, and estopped himself from maintaining an action against them therefor.

(3) That his claim of misrepresentation in this respect when made to Deis and Gerstenberg fell short of the misrepresentation as alleged in the declaration and as testified to by him at the trial, and that, therefore, the trial court was right in refusing to submit to the jury the question of whether the representation was made as so alleged and so testified to.

(4) That if made as alleged, and if false, the representation was not one sufficient to support an action of deceit.

(5) That if made as alleged, and if false, and if sufficient in law, the representation was so unreasonable that the appellant was not justified in relying upon it.

We take up these contentions in their order:

(1) This being a civil action, the plaintiff, appellant here, was required to prove his case by a preponderance of the evidence only, and not beyond reasonable doubt. In the main brief we cited as a sufficient authority for this proposition the case of *United States vs. Regan*, 232 U. S., 237, and stated that numerous other cases to the like effect might be cited, as they were ineffectually cited to the trial court, but in view of this absolutely controlling authority there seemed to be no need of further citation.

The appellees now deny the controlling effect of the *Regan* case and earnestly challenge the appellant to submit the other authorities referred to. In that case the Supreme Court held that "while in a strictly criminal prosecution the jury may not return a verdict against the defendant unless the evidence establishes his guilt beyond a reasonable doubt, in civil actions it is for the jury to resolve the issues of fact according to a reasonable preponderance of the evidence, and this although they may involve a penalized or criminal act," and the court cited with approval a Massachusetts case (*Roberge vs. Burnham*, 124 Mass., 277), which mentioned among the civil actions to which the rule was applicable, suits for the maintenance of bastard children, to obtain divorce for adultery, actions for assault, for criminal conversation, and for seduction, and others which, the court said, might be named. The opinion in the latter case did not happen to name the action for deceit, but that action is a civil one, and certainly the rule is as applicable to it as to the actions specifically named. But in view of the futility of the diligent search which the learned counsel for the appellees say they have made for fraud cases to

which this rule has been applied, and their challenge to us, we give a number of such cases in a foot-note. They are all cases of fraud and each involves the question under consideration.*

*In *Gordon vs. Parmalee*, 15 Gray, 413, which was an action upon a promissory note given for the purchase of land, which the defendant alleged he was induced to make by false and fraudulent representations as to the quality and quantity of the land, the court held that the defendant was not bound to prove such misrepresentations beyond a reasonable doubt, but only by a preponderance of the evidence as in other civil cases.

In *Eames vs. Morgan*, 37 Ill., 260, which was an action of deceit in selling land upon the representation that it was clear of incumbrance, the court held that the following instruction by the lower court to the jury was correct:

"2. That a party alleging fraud must prove it to the satisfaction of the jury, but in a civil action like the one at bar the party alleging fraud is not bound to prove its existence beyond a reasonable doubt. It will be sufficient if the fact is established in the minds of the jury by the weight and preponderance of the evidence only. It is not necessary that the proof should be of such a character as would warrant the conviction of the defendants in a criminal prosecution for false and fraudulent representations."

In *Burr vs. Wilson*, 22 Minn., 206, which was an action of deceit, the trial court was requested, but refused, to instruct the jury "that to justify a finding that the defendant had made the false representations charged, that fact should be proved beyond a reasonable doubt." Held not to be error.

In *Sparks vs. Dawson*, 47 Tex., 138; *Bullard vs. His Creditors*, 56 Calif., 600; *Lee vs. Pearce*, 68 N. C., 76, all civil cases involving charges of fraud, instructions to the jury by the trial courts that the fraud charged must be proved beyond a reasonable doubt were held to be erroneous.

In *Ford vs. Chambers*, 19 Calif., 143, the court said:

"Issues of fact in civil cases are determined by a preponderance of the testimony; and this rule applies as well to cases in which fraud is charged as any other."

In *Sommers vs. Oppenheim*, 44 N. Y. Supp., 396, it was held that fraud in a civil action need not be proved beyond a reasonable doubt, although it is in the nature of a crime.

In *Jones vs. Greaves*, 26 Ohio St., 2, in which fraud was directly in issue, the court said:

"There is no doctrine of the law settled more firmly than the rule which authorizes issues of fact in civil cases to be determined in accordance with the preponderance or weight of the evidence. * * * But in criminal cases, where compensation is not an element, the rule may be and is different."

In *McConihe vs. Sawyer*, 12 N. H., 396, which was a writ of entry involving a transfer of property, alleged to be in fraud of creditors, the court said, at p. 403:

"Now the position of the counsel is, in substance, that if the jury should not be satisfied beyond a reasonable doubt of the fraudulent intent in this case, if the evidence do not directly prove the intent, they should find for the tenant. But we are not aware that this

(2) In arguing that the appellant by his silence waived the fraud of the appellees in the making of this false Solomon representation, and is now estopped from maintaining an action therefor, the appellees in their brief (p. 13) say:

"It is elementary that if a party to a contract discovers that he has been induced to make it by misrepresentation or imposition of any kind, he cannot keep silence, permit and encourage the other parties to proceed *under the contract* until it is ascertained whether or not the adventure will or will not prove profitable to himself and then adhere to or repudiate it as it is ultimately developed will be most to his own advantage."

(While the appellees state in their brief that the appellant admits his discovery of the falsity of this alleged representation in March, 1907, only a few days after his payment of the \$35,000, this is not a strictly accurate statement of the evidence. Appellant testified that he ascertained in March that Solomon was not a man of means and was not ready himself to put \$150,000 into the enterprise; but witness thought that he, Solomon, might raise that amount through his friends, as he then said he could do (R., 67); and as an explanation of why he did not then charge Deis and Gerstenberg with these misrepresentations he replied

strictness of proof has ever been required in civil cases, even where fraud is alleged."

In 14 Am. & Eng. Ency. (2d ed.), p. 201, under the caption "Fraud and Deceit," it is said:

"According to the overwhelming weight of authority, fraud need not, like the guilt of the accused in a criminal prosecution, be established beyond a reasonable doubt. A preponderance of the evidence, as in any other civil case, is sufficient, provided the proof is clear and strong enough to preponderate over the general and reasonable presumption that men are honest and do not ordinarily commit frauds, and reasonably to satisfy the understanding and conscience of the judge or jury. If it does this, it is sufficient both at law and in equity."

See also:

- Catasauqua Mfg. Co. vs. Hopkins, 141 Pa. St., 30.
- Young vs. Edwards, 72 Pa. St., 257.
- Linn vs. Wright, 18 Tex., 317.
- Adams vs. Thornton, 78 Ala., 489.
- Bryant vs. Simoneau, 51 Ill., 324.
- Carter vs. Gunnels, 67 Ill., 270.
- Hitchcock vs. Baughan, 36 Mo. App., 216.

that the latter had his money and that he did not want to antagonize them, but he wanted to find out and be sure things were wrong (R., 47).)

But the principle of law contended for by the appellees has no application to this case. Appellees' silence or failure to make charges of misrepresentation cannot in any sense be said to have been a permission or encouragement to the appellees to proceed "under the contract," for the very good reason that the contract had already been executed. Appellant had received the stock and paid his money; nothing remained to be done.

It is a perfectly true principle that if the defrauded party to a contract of sale acquires knowledge of the fraud while the contract remains executory, and thereafter does any acts in performance or affirmance of the contract, or exacts performance from the other party, he thereby condones the fraud and waives his right of action; but it is equally true that where the plaintiff has fully executed his part of the contract, acts thereafter done by him in affirmance of the contract and with knowledge of the fraud, will not amount to a waiver, for he is entitled to realize whatever he can make out of the contract and his right to affirm it and retain its benefits is absolute according to the rule giving him his election of remedies. That rule is that a defrauded party may repudiate the contract and tender back what he has received under it, or may recover what he has parted with or its value; or he may affirm the contract, keeping what property or advantage he has derived under it and may recover in an action of deceit the damages caused by the fraud. While his affirmance may preclude him from rescinding the contract it does not prevent his maintaining an action of deceit.

Delay or acts which might preclude the defrauded party from rescinding the contract induced by the fraud, do not affect his right of action for damages, but he may bring his action for deceit at any time within the period fixed by the statute of limitations irrespective of any claim by the defendant that he has been harmed by such delay.

Wilson vs. Nichols, 72 Conn., 173.

Dayton vs. Monroe, 47 Mich., 193.

The fact that the plaintiff in an action of deceit, based on the purchase by him of shares of stock in a mining corporation, which purchase was induced by false representations by the defendant that he had given \$25,000 for a fourth interest in the mines owned by the company, acted and continued to act as a shareholder in the company after he had knowledge of the fraud, is not a waiver of his right to maintain the action.

McAleer *vs.* Horsey, 35 Md., 439.

Weaver *vs.* Shriver, 79 Md., 530, was an action of deceit growing out of a sale to plaintiff of shares of corporate stock by the defendant, the alleged false representation by the defendant being that other stockholders had paid par for their stock, whereby the plaintiff was induced to pay par for his. The court held that if after the discovery of the alleged fraud the plaintiff treated the contract as still in force, that fact could only have the effect of preventing a subsequent rescission by the plaintiff of the contract. The court said:

"This court, in Groff *vs.* Hensel, 33 Md., 166, has said that 'In all cases of fraud the vendee, who alone has the right of its affirmance, may remain silent and bring his action to recover damages for the fraud, or may rely upon it by way of defense to the action of the vendor, although there has been a full acceptance by him with knowledge of the defects of the property. An affirmance of the contract by the vendee with such knowledge merely extinguishes his right to rescind the sale; his other rights remain unimpaired.' "

In Wilhams' *vs.* McFadden, 23 Fla., 143, the court held that the fact that the vendee took possession of the land which he had been induced to buy by reason of alleged false and fraudulent representations by the vendor, without expressing dissatisfaction, does not estop him from maintaining an action of deceit.

In Mattlock *vs.* Reppy, 47 Ark., 148, it was held that the fact that a party injured by fraudulent representations as to the property sold to him, accepts and holds the prop-

erty after ascertaining the fraud, is neither a waiver of the fraud nor estops him from suing for damages. "The false representations" says the court, "are in the nature of warranties."

In *Cottrill vs. Krum*, 100 Mo., 397, it was held that in an action for false representations charged to have been made by the defendant as to the value of corporate stock exchanged for real estate, the plaintiff did not waive his right to maintain an action for damages because after obtaining the stock and before suit he offered the stock for sale at par, nor because of delay in bringing the suit.

While proof of silence and acquiescence by the defrauded party in an action of deceit in which the contract is executed may be admissible, we submit it is only admissible as tending to show that the alleged false representations were not in fact made as alleged, or that, if made the plaintiff did not rely on them. Such proof cannot in the nature of things be admissible for the purpose of showing a waiver by the plaintiff, or raising an estoppel against him, so long as the law remains as it is, namely, that a defrauded party may affirm the contract and maintain an action for fraud, in which his recovery will be the difference between the value of the thing that he has received and what its value would have been if the fraud had not been perpetrated.

(3) The answer to the third contention of the appellees is that the alleged false representation for which the appellant seeks a recovery was as stated in the declaration and as testified to by the appellant, and not as mentioned in his subsequent letter, namely, that "several parties were after this pump and it would only be a question of a few months until we would get our money back."

It was for the jury to say whether the representation was as alleged in the declaration and as testified to by the appellant. The fact that it was made as alleged and as testified to, is demonstrated on pages 8 to 13, both inclusive, of the appellant's main brief, to which careful attention is invited.

(4) The next contention of the appellees is that it was not until two days before the expiration of three years after

his contract of purchase that any of the alleged misrepresentations sought to be recovered upon in this action were in any manner set up or claimed to have been made. We have already shown that no delay short of the period of limitations affects the right of the plaintiff to maintain the action. But the appellees' statement is not borne out by the facts in the record. The alleged misrepresentations or the substance of them were set up and claimed to have been made by the appellant before the action was brought. See his letter to Gerstenberg of October 9, 1908 (R., 97).

See also discussion of appellant's alleged delay on pages 59 and 60 of appellant's main brief.

(5) The next contention of the appellees with respect to the alleged Solomon misrepresentation is, that what someone else had offered, or was willing to give, is not, under the authorities, sufficient to support an action of deceit. Appellees state in their brief at page 22 that no authorities have been cited in support of the proposition that the representation by Gerstenberg and Deis (if they made it) that a third party was ready and willing to pay a larger sum than that at which the shares were offered to the plaintiff, would, if untrue, constitute a representation for which an action of deceit or any other action would lie, and that the authorities are believed to be unanimously to the contrary. The appellees have apparently overlooked the fact in the appellant's brief, at page 33, a case precisely in point is cited, viz: *Ives vs. Carter*, 24 Conn., 392.

It is submitted that that case is undistinguishable in principle from the instant case. Certain it is that the appellees have not attempted to distinguish it.

In appellees' brief two cases only are cited as being in point—that of *Bishop vs. Small*, 63 Me., 12, and *Dillman vs. Nadelhofer*, 119 Ill., 567.

In *Bishop vs. Small*, the court says the alleged false representations were loose, exaggerated, vague, and indefinite recommendations, including statements of offers the vendor had received, and of interest in the patents he had sold. In that case the name of the person or persons making the offer was not given, nor was it stated when the offers were made

or whether they were made by responsible or irresponsible persons. In the case at bar, the name of the person making the offer was given; it was stated that he was in the city ready to pay over the money; the amount of the offer was given, and the appellant was told that he must decide at once because of the presence of the man making the offer and his readiness to carry it into effect. In addition, the appellant was dragged out of the Willard Hotel for fear that he would come in contact with the party making the offer, and he was told that such party was very angry and had left the city because the appellant had gotten ahead of him. All of these specific statements were made prior to the appellant's paying over his money. There was nothing loose, vague or indefinite about them, but on the contrary they were seductively specific. But the court, in *Bishop vs. Small*, expressly states in its opinion that, in deciding the question presented to it, it decides it differently from other courts. In its opinion it says:

"So far as the contrary doctrine is held in the case of *Ives vs. Carter*, 24 Conn., 405, it is not in accord with the cases cited. The late case of *Somers vs. Richards*, 46 Vt., 170, sustains the plaintiff's proposition in the case at bar, but it is clearly at variance with our own decisions. We think the rule adopted by us is the more reasonable and logical one."

The other case cited by the defendant, that of *Dillman vs. Nadelhofer*, was a suit in equity brought for the rescission of a contract on the ground of fraud. The court was, therefore, sitting as a chancellor weighing the facts and deciding the case as the facts and the law required. In the case at bar the function of the trial court was very different. It had no right to determine any question of fact presented, and its duty was to submit the plaintiff's case to the jury, unless admitting the plaintiff's testimony to be true and making all reasonable deductions therefrom, in favor of the plaintiff, all reasonable men would necessarily come to only one conclusion and that adverse to the plaintiff.

In *Dillman vs. Nadelhofer*, the court in its opinion said:

"We are also clearly of the opinion that under the circumstances of this case the appellant was not warranted in relying on the statement that the appellee had already been offered \$25,000 for the patents. *Conceding that such a representation under some circumstances might be ground for equitable relief*, there are a number of reasons why it cannot be so regarded in this case. In the first place, the statement is too general and vague. *There is nothing in it to indicate when, where or by whom it was made, or whether it was made by a responsible or irresponsible person.* Moreover the very fact that appellee consented to accept of appellant \$23,000 when another, according to the representation as claimed, was standing by ready to pay him \$25,000, ought to have satisfied any reasonable person that the representation could not be safely relied upon. But the case is still worse than this. The \$23,000 was not given for the patents alone but also for appellees' interest in the partnership, and the entire partnership effects. Under the circumstances, if the appellant placed any reliance upon the representation in question, as he claims he did, it was the sheerest folly to do so and he has no right to complain."

Manifestly that case is distinguishable from the case at bar. As shown, it was an equity case with the court as the trier of the facts. The representation of the offer in the case at bar, met the objections as to vagueness and generality mentioned in the court's opinion in the case under discussion. The reason why the appellees were willing to accept less from the appellant than from Solomon was explained by the appellees to the appellant when they told him of Solomon's offer. It was for the jury to pass upon the reasonableness of this explanation and not for the court to determine that it was unreasonable.

The appellees cite *Kimball vs. Bangs*, 144 Mass., 321, as an analogous case. The most cursory examination of it will show that it is not a precedent for the case at bar, for among the alleged misrepresentations in that case there was none of an offer by a third person to purchase. It did involve the sale of a patent, however, and as its citation was evidently

for the purpose of leaving the impression on the court that, as a rule, the action of deceit will not lie where the subject-matter of the sale is an invention, or patent right, we submit the following authorities all of which involve representations concerning patents, inventions, or matters relating thereto:

The vendor of the patent match box and of the territory covered by the patent, represented to the vendee, who had himself no knowledge on the subject, and no means of obtaining it, that the territory proposed to be sold was very valuable; that other parties had made purchases and all had done well and had realized large profits. It was held that the vendee had the right to rely on these statements, and having done so and the statements having proved to be false, he had a right of action to recover back the money paid for such patent right.

Allen vs. Hurt, 72 Ill., 104.

"That the representations were most material as affecting the value of the patent right, is a proposition too plain for argument. For, if indeed it were true, that by the defendant's method of working steel and iron, articles manufactured from steel by this method would be worth for use from 25 to 75 per cent more than articles of the same kind manufactured by the old process; if it would cause a great saving of material and would temper anything made of steel without cracking or warping in the slightest degree; if it was a sure process, it would surely be introduced, when made public, into all the steel and iron manufactories of the country and soon work a complete revolution in the most important branches of industry. It is very obvious therefore that such representations would constitute the strongest inducement to purchase an interest in the patent right for which so much was claimed."

Page vs. Dickinson, 28 Wis., p. 700.

Any untrue representations made by the seller of the right to make and sell a new invention, as to the capacity of the machine, or its fitness for the purposes for which he knew it was intended, would be fraudulent, if they were made

under such circumstances as authorized the purchaser to rely upon them; and in the absence of proof it would be inferred that they had induced the purchase; and to repel this inference the seller must prove either that the buyer had knowledge of facts which showed the representations to be false, or that he expressly stated in terms, or showed by his conduct, that he did not rely upon them but acted on his own judgment.

Gaty vs. Holcomb, 44 Ark., 216.

A purchaser of a patent right may rely on the representations of the seller as to what is covered by the patent; *Rose vs. Hurley*, 39 Ind., 77; although by searching the records of the Patent Office he might have discovered the fraud. *David vs. Park*, 103 Mass., 501.

A purchaser of patented articles to be resold has a right to rely on the representations of the manufacturer as to the usefulness and suitableness of the articles to be furnished.

Tabor vs. Peters, 74 Ala., 90.

A corporation which is purchasing the right to sell an invention, may rightfully rely upon the statements and representations of the vendor as to its utility and success and is not bound by the doctrine of *caveat emptor*.

Ia. Economic Heater Co. vs. The American Economic Heater Co., 32 Fed., 735.

The vendees of a patent right may rely on the statements of the vendor as to the terms of contracts which have been made with other persons for the sale of the patented article.

Gatling vs. Newell, 12 Ind., 118.

The representations of an inventor for the purpose of effecting a sale of his invention may be relied on.

Hicks vs. Stevens, 121 Ill., 186.

See also

Neil vs. Cummings, 75 Ill., 170.

(6) The last contention of the appellees with respect to the Solomon representation is that it was so unreasonable and incredible as to be insufficient in law to constitute the basis of recovery in an action of deceit. In other words, admitting that the representation was made and that it was false, the plaintiff had no right to believe it, and the trial court was justified in holding as a matter of law that the appellant's credulity precluded him from maintaining the action.

Where a party claiming to have been defrauded knows that the statement made to him was false and such knowledge is admitted by him, or clearly brought home to him, it may be that he cannot recover for the fraud; or, where he claims not to have known it was false, but that it was false is manifestly obvious to his senses, it may be that he cannot recover. So reliance must be placed on the common organs of sensation rather than on the statements of any one. *Irving vs. Thomas*, 18 Me., 418.

But where there is active, positive fraud, as for example, where it is admitted that a false representation was made, and the defrauded party had no present means of determining its truth or falsity by observation or otherwise, it is not believed that the law is that the guilty may urge the negligence of the defrauded party as a defense; or at any rate where, as in the case at bar, a party to whom a false statement is made, asked for an explanation and was given an explanation and accepted it, it is at least a question for the jury whether he as a reasonable man should have done so. The fraud being conceded, the reasonableness of his action is not a question of law for the court but of fact for the jury.

In *Gardner vs. Trenary*, 65 Ia., 646, which was an action of deceit, the evidence showed that the defendant falsely represented to plaintiff that his invention, a device to attach a walking plow to a sulky so as to make a sulky plow of the combination, could be made to work on any ordinary sulky cultivator; and in testing it deceived his victim by

using an iron neck yoke, which was painted to resemble wood. It was held that the law would not permit the defendant who had committed such a fraud, to protect himself with the claim that his victim was easily deceived and did not act in the matter with reasonable prudence.

“It is no excuse for, nor does it lie in the mouth of the defendant to aver that the plaintiff might have discovered the wrong and prevented its accomplishment, had he exercised watchfulness, because this is equivalent to saying, ‘you trusted me, therefore I had the right to betray you.’”

Pomeroy *vs.* Benton, 57 Mo., 531.

“It is not just that a man who has deceived another should be permitted to say to him, ‘You ought not to have believed or trusted me’ or ‘You were yourself guilty of negligence.’”

Bigelow on Fraud, p. 524.

“No man can complain that another man has relied too implicitly on the truth of what he himself stated.”

Kerr on Fraud, p. 81.

“When parties deal at arm’s-length, the doctrine of *caveat emptor* applies; but the moment the vendor makes a false statement of facts and its falsity is not palpable to the purchaser, he has an undoubted right implicitly to rely upon it. That would indeed be a strange rule of law, which, when the seller had successfully entrapped his victim by false statements, and was called to account in the court of justice for his deceit, you permit him to escape by urging the folly of his dupe, for not suspecting that he, the seller, was a knave. In the absence of such a suspicion it is entirely reasonable for one to put faith in the deliberate representations of another.”

Fargo Gas Light & Coke Co. *vs.* Fargo Gas & Electric Co., 4 N. D., 219; 37 L. R. A., 593.

Reply to Appellees' Contention Regarding the Representations as to the Efficiency of the Pump.

The second and third alleged false representations by Deis and Gerstenberg to appellant are treated by the appellees in their brief together.

They were that the Deis pump had been tested and had been found to require in its operation 75 per cent less power than pumps in ordinary use; and that an engineer in charge of the electrical department of the Government had tested the pump and had reported that it required in its operation 75 per cent less power than pumps in ordinary use.

The appellees in their brief do not deny, or attempt to deny, that these representations were made as alleged; that they were false; that they were material, and that they were relied upon by the appellant and were one of the inducing causes of his purchase of the stock in question. They take the position that on the trial the burden was upon the appellant to prove that Deis and Gerstenberg did not believe these representations to be true when they made them, and had no reasonable grounds for that belief; that the appellant did not discharge that burden and that, therefore, the court below was right in directing a verdict (Appellees' Brief, pp. 46-47).

Where one person by a material representation induces another to make a purchase, and it develops afterwards that the representation is false, and the vendor seeks to escape liability upon the ground that he believed the representation to be true when he made it, and had reasonable grounds for so believing, logic and common sense, to say nothing of the rules of evidence, would seem to place upon him the burden of proving his belief and its reasonableness, and not to require the vendee to assume this burden, which would necessitate his proving a negative, namely, that the vendor had not such belief and reasonable grounds for it.

"Where the misrepresentation charged as the basis of the fraud is admitted to have been made and to have been untrue, but facts are alleged as a justifi-

cation, the burden of proof is upon the party alleging such justification in the first instance."

6 Ency. Evidence, p. 9.

Therefore, the appellees in not denying the falsity of these representations, but seeking to justify themselves by claiming belief on the part of Deis and Gerstenberg in their truth, and reasonable grounds for that belief, would plainly seem to have imposed upon them by a recognized rule of evidence the burden of proof.

But the appellees, perhaps wisely, do not content themselves with relying upon their contention that the burden of proof in this respect was upon the appellant. They take the stand that the appellant concedes that Deis and Gerstenberg believed these false representations to be true when they made them; and they further claim that the evidence they, the appellees themselves adduced, so clearly showed that they had reasonable grounds for that belief that the trial court was justified in so determining without submitting the question to the jury.

But in behalf of the appellant, his counsel desire to say emphatically, positively and unequivocally that the appellant makes no such concession. The declaration in this case charges that the representations were made "falsely, fraudulently, and deceitfully" (R., 4). The appellant in his case in chief and in rebuttal gave evidence tending to show that the representations were false; that they were material and that they induced him to make the purchase; and he contends that from all the evidence adduced in the case the fair and reasonable inference to be drawn is that Deis and Gerstenberg knew or were reasonably chargeable with knowledge of the falsity of the representations. The statement in the appellees' brief that the appellant concedes that Deis and Gerstenberg believed in the truth of the representations, is based not upon evidence but upon what the appellees say the appellant testified he *thought* Deis and Gerstenberg believed. What the appellant may have thought was not evidence and attention was called to that fact at the trial by his counsel. The appellees on page 16 of their brief print

a partial extract of the plaintiff's testimony on cross-examination and say that that amounts to such a concession as is contended for. The questions and answers quoted were:

"Q. * * * Do you think they believed the engineer's report?

"A. I think they believed the engineer's report. Yes.

"Q. You believe they did?

"A. Yes, sir.

"Q. So, when they told you that, they thought it was true?

"A. Yes, sir."

If the court will examine the context as well as the entire testimony of the appellant, it will be reasonably apparent that what the appellant meant to say when he answered the questions which are quoted was that he thought *at the time the representations were made to him*, Deis and Gerstenberg believed the engineer's report and thought it was true. By referring to page 68 of the record it will be observed that immediately before being asked the questions that the appellees quote and in replying to them, the following questions were asked and answers made:

"Q. Did they make any statement to you on March 6th that you now think is not honest?

"A. Yes, sir.

"Q. What is that?

"A. The statement that that pump could save 75 or 80 per cent over ordinary power.

"Q. Did they tell you why they thought it would do that?

"A. They told me they could do it positively. They did not think.

"Q. Did they tell you that the Government engineers had so ascertained and given their report?

"A. Yes, sir" (R., 68).

And if the court will look at page 95 of the record it will observe that later in his cross-examination the following question was asked the appellant and the following reply made to it by him:

"Q. At the time you were writing these letters and after you had bought the stock, you knew in January, 1908, they had not tested out these things and had not told you the truth, did you not?

"A. I guessed they had not told me the truth. I thought they had not told me the truth because they refused to make the test."

As the record shows, the cross-examination in this case was a very severe one, conducted as we all know by a master of the art of cross-examination. As a result the appellant was frequently confused by questions put to him in such a form as to have confused anyone. To base a contention that the appellant concedes that Deis and Gerstenberg believed their representations to be true upon the partial extract from his testimony made by the appellees in their brief at page 31, is a display of professional ingenuity only equaled by the ingenuity that was shown in forcing the appellant on his cross-examination to say something that he plainly did not mean, and could not have meant. Additional indication that the appellant did not think that Deis and Gerstenberg believed in the truth of their representations, is to be found in his letter to Gerstenberg of October 9, 1908, wherein he says that he had been led to believe by the two of them that the pump was past the experimental state; that it seems that this was not the case; that he had been led to believe by the two of them that several parties were after the pump; that it was on these representations that he purchased a one-third interest; that it has turned out since that the pump was not ready to present to either the manufacturer or the buyer (R., 97). We repeat, therefore, that the appellees are not justified in saying as they do in their brief at page 47, that "the plaintiff at the time expressly testified to his conviction that they (Deis and Gerstenberg) did believe them (the representations in question) the truth of which concession is established by all the direct and all the circumstantial evidence in the case" (R., 47).

But, after all, whether Deis and Gerstenberg believed

these representations to be true or not, is really wholly beside the question.

11 one who has, and is known to have, the best means of knowledge in respect to a given subject, takes upon himself to make representations relative thereto for the purpose of influencing another's action, and does influence it accordingly, the law will treat him guilty of a fraud, if such representations are untrue, *although he may not have known of their falsity.*

Water Commissioners *vs.* Robbins, 82 Conn., 623.

"If he made the representation, which it is claimed he did make, with the purpose of procuring the contract in question, and with the intent that the plaintiff should act upon it, without knowledge whether it was true or not, it will be a false representation within the rule. *Cooper vs. Schlesinger*, 111 U. S., 148; *Lehigh Zinc & Iron Co. vs. Bamford*, 150 U. S., 665."

Simon vs. Goodyear M. R. S. Co., 105 Fed., p. 580.

"Nor is it always essential that the party making the representations knew them to be false. It is sufficient that he ventured assertions without knowing whether they were true or false 'for it is said that 'the affirmation of what one did not know or believe to be true is equally in morals and in law as unjustifiable with the affirmation of what is known to be positively false.'" *Southern Development Co. vs. Silva*, 125 U. S., 247; *Farrar vs. Churchill*, 135 U. S., 609; *Smith vs. Richards*, 13 Pet., 26; *Lehigh Zinc & Iron Co. vs. Bamford*, 150 U. S., 665; *Trenchard vs. Kellogg*, 127 Fed., 596; *Simon vs. Goodyear*, 105 Fed., 573."

King vs. Lamborn, 186 Fed., pp. 27-8; 108 C. C. A., p. 129.

Where the alleged misrepresentation in the sale of an automobile was that its engine would develop thirty horsepower, it was held that as the representation induced the contract and was made for that purpose, the vendee was en-

titled to rescind the contract if the representation proved to be false, *whether it was known to the seller to be false or not.*

Joslyn *vs.* Cadillac Automobile Co., 177 Fed., p. 868.

In McAleer *vs.* Horsey, 35 Md., 439, which was an action for deceit in the sale of mining stock, procured upon the false representation by the vendor that he had paid \$25,000 for a one-fourth interest in a mine and \$10,000 as actual working capital, whereby he procured the vendee to believe that the mines were worth \$100,000, it was held that it was no defense that the vendor *believed the mines to be worth the sum stated by him.* And in that case the court quoted with approval the following language of Judge Story in Daggett *vs.* Emerson, 3 Story, 733:

"If his representation is false in any one substantial circumstance, going to induce the essence of the bargain, and the vendee is thereby misled, the sale is voidable; and *it is wholly immaterial whether the representation be wilfully and designedly false, or ignorantly and negligently untrue.* The vendor acts at his peril, and is bound by every syllable he utters or proclaims or knowingly impresses upon the vendee as a true or decisive motive for the bargain."

And in this court in Magruder *vs.* Montgomery, 33 App. D. C., 133, it was held that representations by the president of a corporation, made to induce the purchase of corporate stock, to the effect that the corporation had abandoned its former business and had purchased and was about to operate another business that had yielded, and was yielding, quite a profit, if false and made *negligently* would entitle the purchaser to recover damages for false representations in an action of deceit.

It is argued in the brief for the appellees that Deis and Gerstenberg had reasonable grounds for believing that these representations, which have turned out to be false, were true.

The proposition of the appellees, based upon Southern Development Co. *vs.* Silva, 125 U. S., 247, that reasonable ground for believing a false representation to be true, is

always a defense to an action for false representation, is hardly an accurate statement of the law. It is subject to the qualification that if the defendant conveys the impression that he has actual knowledge of the existence of the facts, when he knows he has no such knowledge, he is as responsible for the injury caused by such representations to one who believes and acts upon them as if he had actual knowledge of their falsity. Thus the Supreme Court in *Lehigh Zinc and Iron Co. vs. Bamford*, 150 U. S., p. 673, a later case than the Silva case, and not an equity case, as the Silva case was, approved a charge by the lower court to the jury, which said:

“Where the representations are material and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is bound to know, or is presumed to know, his actual knowledge of their being untrue is not essential.”

And see the other cases, including *Browning vs. Bank*, 13 App. D. C., 1, cited at pages 52-56 of appellant's main brief.

But assuming for the moment that the contention of the appellees be sound that reasonable ground for believing a representation to be true, is of itself a defense to an action for false representations, and also assuming that the appellees honestly believed these representations as to a test having been made of the pump in question, and its results, which representations it is now admitted they made—does the evidence so clearly show that they had reasonable grounds for that belief that the trial court was justified in so holding as matter of fact, and refusing to submit the question to the jury?

The appellees in their brief (p. 34) claim that the so-called Reid and Croskey reports as to the value of the invention afforded reasonable ground for belief on the part of Deis and Gerstenberg as to the value of the invention at the time they were given, and they say, “There was no claim, nor is there any testimony in the record to the effect that the improvement represented by letters patent No. 840,919 (the

latest patent) rendered the reports of the experts upon the invention before that improvement had been made no longer pertinent or relevant to its merits," and they say that the testimony of their own witness, Weller, is the only evidence in the case relating remotely even to that point, and that he regarded all the patents of value.

We say there was, and is, such a claim; that there is such testimony in the record, and that there is absolutely no evidence showing that the pump covered by the latest patent is a mere improvement of the inventions covered by the prior patents. On the contrary, the evidence shows that the prior inventions related to devices or combinations radically different from the pump covered by the latest patent, and it also shows that Deis and Gerstenberg knew this, and not only could not as reasonable men have believed that reports of experts based upon the prior inventions afforded grounds for believing in the efficiency of the latest device, but that in using those reports to induce the appellant to acquire an interest in the latest device they perpetrated a gross fraud upon him.

In the first place appellant himself testified, and his statement is, of course, on this hearing to be accepted as true, that "before he paid his money he had seen but one letters patent; that they (Deis and Gerstenberg) had said that they had more than one, but *they were not using those*, but were using only this particular one; that witness knew there were others and did not examine them *because Deis and Gerstenberg said that they were not the pump they were manufacturing*" (R., 71).

And yet, while Deis and Gerstenberg were telling their victim they were not using the previous inventions and patents, thus clearly implying they had abandoned them in favor of the latest one, which they exhibited to him, together with a model of it, they actually then had pinned on the wall so he could see it, and, according to Gerstenberg's own testimony (R., 176) showed him, a printed copy of this Reed report, which now confessedly related to one or more of these abandoned inventions. That report, as will be seen if it is examined (R., 169), contains no description of the

invention but merely relates to what is called the Deis pump, and ends by saying that the test of it showed a saving of power required over any pump on the market of at least 85 per cent. And as a sidelight on the value of this Reed report, it should not be forgotten that at or about the time it was made Reed was "rebuilding or modifying," as Morningstar puts it, a pump in the stable where Deis was exhibiting, and trying to sell stock in the Deis Pump Co. on a commission of from 10 per cent to 20 per cent (R., pp. 32 and 182).

Could there be a more flagrant fraud than selling an interest in an invention on the strength of so-called expert reports based upon another invention?

How can appellees' counsel seriously contend that so-called expert reports on one invention afforded them reasonable ground for belief in the efficiency of another and later invention?

In order to show the differences between the inventions covered by the four Deis patents and to demonstrate that the latest invention had little, if any, relation to the earlier ones, it will be necessary to call attention, in some detail, to the evidence.

Thomas A. Lewis, an expert witness for the appellant, testified that the patents of July 22, 1902, and December 23, 1902, showed a single-acting submerged working barrel, the piston rod in both cases carrying a float which was intended to counterbalance the working parts; that the former patent depicted a prime mover showing a weighted pendulum actuated by a solenoid; that the patent of December 23, 1902, depicted a prime mover with a weight or counterbalance drum and escapement; that the patent of May 3, 1904, showed a submerged-double-plunger pump with a control piston carrying a submerged float to counterbalance the working parts with a similar motor power as depicted in the patent of December, 1902, and that the patent of January 8, 1907, depicted a submerged single-acting double piston with a counterbalance lever and weight on the piston rod and did not show any prime mover (R., 122).

Albert C. Wood, another expert who testified for the appellant, stated that a "pump constructed in accordance with the design of the last patent would take more power to operate because of the greater friction of the moving parts in proportion to the water actually pumped" (R., 129); that a "pump constructed in accordance with the specifications of the first three patents would not require any more or less power to operate than a pump in ordinary use, because they are pumps of the ordinary plunger type, *nothing being claimed for the construction of the pump itself in the first three patents*" (R., 131); that the mechanism for operating the pumps in the first three patents would develop very little power unless made on a very large scale; that in two of these patents the inventor shows the clock mechanism with a weight for operating the pump; "*that as far as the pump itself is concerned the pump covered by the first three patents is similar to the plunger pump in every-day use*"; that the inventor's judgment, so far as the first three patents are concerned, as to the amount of power required to operate the pump, was wrong, otherwise he would not employ such mechanism as he has shown to do the work, as they are such as no schoolboy would be guilty of (R., 121); that the motors shown and described in the specifications of the first three patents are very inefficient; *that the patents were granted on the combination of actuating mechanism and pump* (R., 132).

Another interesting bit of the testimony of Mr. Wood, who, it will be recalled, came to Washington in March, 1907, a week or two before the appellant made his unfortunate purchase, was that the model which Gerstenberg then exhibited to him was of the pump covered by the latest patent, and that the witness did not recall that he saw any models of the device called for by the other three patents (R., 130).

John W. Steward, Deis' brother-in-law, when he came to testify for the appellees, contradicted the appellant, who had said that, in the interview in Seward's office in Patterson, in March, 1907, he only saw the latest patent, and said that he had gone over all of the patents with the plaintiff, but he,

the witness, added that he did not treat the first four (meaning the first three) with very much detail; that witness talked more specifically of the patent of 1907, *because that was the one that witness thought he, the appellant, would be most interested in and that was the one he took home with him* (R., 154).

Francis R. Weller, an expert witness for the appellees, also testified as to the differences between the several Deis patents. His testimony on the subject is too lengthy to be quoted, but it will be found on pages 183 *et seq.*, of the record. His testimony clearly shows that the last so-called invention of Deis was utterly different from the preceding ones. As a matter of fact the testimony of all of the expert witnesses, when examined, will show that the device covered by the latest Deis patent was nothing more nor less than an ordinary pump turned upside down, with the piston immovable instead of movable, and the cylinder movable, instead of immovable, as in ordinary pumps. See Prindle's testimony (R., 144), and Weller's testimony, page 184. Weller testified: "If you showed a person the model in evidence (which was a model of the device covered by the latest patent) it would simply show him an ordinary pump, in a measure turned upside down, with five valves instead of two valves" (R., 187).

But it is urged by the appellees that the report of H. S. Morningstar, a successor of Reid in the Navy Yard, also afforded reasonable ground for the belief of Deis and Gerstenberg in the truth of the representations made by them to the plaintiff that the pump had been tested by a Navy Yard engineer and had been shown to save 75 per cent to 80 per cent in efficiency over the ordinary pump (Appellees' Brief, p. 35).

The meaning which any reasonable man would necessarily attach to this representation was that the Deis pump had been honestly tested by a Navy Yard engineer, in comparison with other pumps of the ordinary type, and that this test, fairly and honestly conducted by this engineer, had shown that the Deis pump took from 75 per cent to 80 per

cent less power to pump an equal amount of water in the same length of time than pumps of the ordinary type. Of course, if reasonable men would differ as to the meaning of the representation, the question as to what it meant was for the jury. *Simon vs. Goodyear Met. R. S. Co.*, 105 Fed., 573; 52 L. R. A., 745.

Was the so-called Morningstar test made six months before appellant's purchase, such a test as the representations implied and did it show the results stated?

Concededly, it was not a test of the Deis pump made in comparison to other similar pumps. It shows on its face (R., 27, 28), that the only pump mentioned in it by way of comparison with the Deis pump was a huge triplex pump at the Navy Yard, throwing a million gallons of water in twenty-four hours, and operated by a 100-horse-power motor. The evidence shows that all that Morningstar, who was an electrician and not an hydraulic engineer, did in the course of the so-called test was to hold in his hand a voltmeter and ammeter and to note on a piece of paper the quantity and force of the electric current which it took to operate the Deis pump. The statement in the report that the pump was single-acting and that it was pumping against a thirty-three foot head were based on what was told him. The measurements in paragraph 1 of the report were "dictated to witness by Deis" (R., 28). The figures in the report showing the quantity of water per minute pumped were those of Deis, and Morningstar "did not know that in any other way except what he was told" (R., 29). The reference to the Navy Yard pump in the report was, according to Morningstar himself, mere guess work (R., 30). The Deis pump had a two-inch cylinder. The Navy Yard pump had a twelve-inch cylinder (R., 31). Morningstar testified that his "part of the test was computing the horse-power required to lift the given quantity of water." Asked why he did not limit his certificate to that he replied, "In the first place this thing was only a preliminary test and after we adjourned to the Deis Pump Company's office to write this up, Mr. Deis requested me to write up the memorandum for the young lady stenographer to copy, he

giving me the head, dimensions of the cylinder, pipe, etc., which was the only way this report could have been written. There was no other way in which this could have been done unless to write it himself and gave it to the clerk; *and then I tacked on my part*" (R., 33). Afterwards, Morningstar told Gerstenberg "that one could not make an examination like that a proper or reliable test for estimating the saving of power" (R., 37), and explained "that the test should be on a comparative basis with another pump of the ordinary type and that I prefer this test not to be used" (R., 30). Morningstar also a few weeks after the so-called test of September 24, 1906, was made told Gerstenberg personally at his place of business that the report could not be used with his permission for any business whatsoever and that witness would like to have the original and all copies; that there was then some talk about another test which witness never conducted. That witness then told Gerstenberg that a comparative test between two pumps of equal size was the proper way to arrive at a definite comparison (R., 30). The witness Carl F. Jaensen, shortly after the so-called Morningstar test, called Gerstenberg's attention to the fact that it was probably wrong, and demonstrated by the figures given that the conclusion as to the efficiency of the Deis pump was erroneous (R., 38).

After urging that Morningstar's own testimony shows that his chief objection to the use of his report was that he had underestimated the horse-power and efficiency of the Navy Yard pump, the effect of which it is claimed was to make the result of his test, not more, but less favorable to the Deis pump than it would have been if he had not made the mistake, appellees in their brief suggest (p. 39) that "it is a rare and singular species of fraud which consists in exhibiting to an intending purchaser an expert report, the inaccuracy of which consists in understanding the efficiency or merits of the article to be sold," and they ask what question *could* the trial court have submitted to the jury upon this point?

In our main brief (pp. 42-46) we have shown that the fair and reasonable deduction to be drawn from the evi-

dence is that the Morningstar report was never in fact exhibited to the appellant. But the question now is whether, in view of the Morningstar report, Deis and Gerstenberg had reasonable grounds for the belief which it is now said they honestly had, that the pump in question had been tested by an engineer in the Navy Yard and by such test had shown a saving of 75 per cent to 80 per cent in power over ordinary pumps. The answer to the appellees' suggestion is that *the report of Morningstar was not the report of a test made by him, and Deis and Gerstenberg well knew that it was not. It was a report, signed by Morningstar, of a test which in all essential respects had been made by themselves.* So that it is an utter impossibility that they could have honestly believed that a Navy Yard engineer had made the test, or have had reasonable ground for believing he had done so. In the preparation of the report, they furnished to Morningstar all of the data concerning the quantity of water pumped, the dimensions of the cylinder of the pump, the head of water which was being pumped, the size of the pipe, the distance from the pump handle to the fulcrum, and Morningstar then "*tacked on his part,*" which consisted merely of the readings of his electrical instruments showing the quantity and force of the current used to operate the pump.

But the appellees say, "no proof was offered, nor pretense made that the head, dimensions of the cylinder, the pipe, the fulcrum, or the quantity of water pumped, or any other data supplied by Deis and Gerstenberg were not accurately furnished him (Morningstar) for the purpose of his test" (Appellees' Brief, p. 38). Appellees here ignore all the evidence in the case showing the utter worthlessness of the pump; the impossibility from a mechanical standpoint of its showing any saving in power over pumps of the ordinary type; and the result shown by Prindle's actual test of the pump in comparison with a pump of the ordinary type, of like size and dimensions, to the effect that the Deis pump actually took more power to operate than the other pump—all of which evidence showed or tended to show

that the data furnished by Deis and Gerstenberg in making the so-called Morningstar test was inaccurate, false and fraudulent.

But whether the data furnished Morningstar by Deis and Gerstenberg was accurate or inaccurate is really beside the question, which is, not whether Deis and Gerstenberg made a test, but whether an engineer in the Navy Yard made one with the results specified, for the charge of the appellant is that the representation they made was that a Navy Yard engineer made the test and had told or reported to them that the pump required in its operation 75 per cent or 80 per cent less power than pumps in ordinary use. Their answer to this charge is, not that such representation was not made; not that it was true; not that it was not material; not that it was not relied upon; but, merely, that Deis and Gerstenberg believed it to be true and had reasonable grounds for that belief. As ground for that belief, there is produced what purports to be the result of a test, signed by this man Morningstar. The evidence, we repeat, shows that the test mentioned in that report was in reality made by themselves and not by the man who signed it. Clearly, then, they told a falsehood when they represented to the appellant that the Navy Yard engineer had made the test. And, as clearly, the attempt now made to base an honest belief upon a falsehood must fail. If they had told the appellant the truth about this so-called test; the part they had played in making it; that Gerstenberg had had charge of supplying the water pumped and had given the data concerning the quantity so supplied; that Deis had furnished all of the other figures, except the reading from the electrical instruments; that the man who signed it had afterwards told Gerstenberg that it was not a test that could be relied upon, but that a test to be fair should be made between pumps of similar size and dimensions, and that he had recalled the report; and that Jaensen, an engineer, had questioned the accuracy of the figures it contained, and the appellant had, notwithstanding being given such information, bought their stock, he would have had no cause to complain, so

far as this representation is concerned. But all of this information they suppressed and concealed, telling him, that which now proves to be absolutely and utterly false, namely, that a Navy Yard engineer had tested the pump, with specified results.

The appellees say in their brief at page 50, "Another of the impressive silences in the brief of the appellant in this case is that as to the existence of any authorities for the proposition contended, that if a vendor states truly the opinions of experts designated by him as commending the article offered for sale, he is guilty of false and fraudulent representations if he does not also state any unfavorable opinions which may have been given by others."

No such proposition is, or has been contended for by the appellant. Appellant's proposition is a very different one, being this: That so long as Deis and Gerstenberg saw fit to make to him a representation concerning a test of the Deis pump, and its results, for the purpose of inducing him to buy stock owned by them in the Deis Pump Company, it was their legal duty to make to him a full and fair disclosure concerning that test, withholding from him no material facts relating to it which were within their knowledge; and to refrain from producing on his mind a false impression concerning it; the person or persons making it, and the circumstances under which it was made; and that it was plainly a question for the jury whether the evidence showed that they committed a breach of that duty. This court has expressly held in *Tyssowski vs. F. H. Smith Co.*, 35 App. D. C., 403, that the gist of the action of deceit is the producing with fraudulent intent of a false impression upon the mind of another party, and it is not important if this result is accomplished whether the means employed was affirmative or negative, whether it consists in words or acts or amounts to no more than a suppression or concealment of material facts peculiarly within the knowledge of the guilty party.

Reply to Appellees' Contentions as to de Kinder Representation.

It is somewhat difficult to gather from the appellees' brief just what their position is regarding the de Kinder representation. Appellant testified that Deis and Gerstenberg at the time of the negotiations for the stock told him that J. H. de Kinder of Philadelphia, an hydraulic engineer, had examined the pump and had reported that it could be operated at a great saving of power over ordinary pumps; and that he would make a report over his signature by which they could get all the money they wanted on it (R., 47); and that this was one of the statements in reliance upon which he parted with his money (R., 56).

Appellees in their brief, seemingly admit that the latter part of this representation, namely, that de Kinder said he would make a report, etc., was made by Deis and Gerstenberg, as appellant testified, but deny that they made the former part of the representation, namely, that de Kinder had examined the pump and reported that it could be operated at a great saving of power over ordinary pumps; or rather, instead of making an out-and-out denial, they say that appellant while he testified on his direct examination that the former part of this representation was made, on his cross-examination, which appellees state was his "final, corrected, ultimate testimony on the subject," he confined himself to stating that only the latter part of the representation was made (Appellees' Brief, pp. 41-2).

Of course, it was for the jury to say whether the testimony of the appellant on his direct examination was changed or modified by his cross-examination.

But Gerstenberg's own testimony as to what he told appellant on the occasion in question about what de Kinder said, strongly bears out appellant's testimony on the subject.

Gerstenberg testified that he told appellant on that occasion, "that de Kinder said that he was very much im-

pressed with it (the pump) and that after he made another test and put his signature to it they could get all the money they wanted" (R., 178). So that it will be observed that the only real difference between appellant's testimony and Gerstenberg's regarding this representation was that appellant said that Gerstenberg told him that de Kinder, after his examination of the pump, reported that it could be operated at a great saving of power over ordinary pumps, while Gerstenberg said that he told the appellant that de Kinder stated that he was very much impressed with the pump. The difference is slight so far as words are concerned, but vital in its meaning. Did not this difference raise a question for the jury to pass upon? ~~Deis~~ ^{De Kinder's} version of what he, himself, told Gerstenberg when he came to Washington was that he "told Gerstenberg that if it (the pump) was all *he claimed* it was a good thing;" that he "told Gerstenberg that while the pump impressed witness favorably *from what Gerstenberg said*, the only way to find out would be to have an engineer make a test and make a complete report thereon, and that if the test showed it was all *he claimed* then Gerstenberg would have no trouble to raise capital" (R., 127), and when on Gerstenberg's request he, de Kinder, recommended an engineer for the purpose, de Kinder recommended A. C. Wood and Gerstenberg asked him to engage Wood (R., 127).

When asked whether or not on the occasion in question he stated to Gerstenberg that the pump could be operated at a large saving in power over that required to operate a pump in ordinary use, de Kinder replied, "I could not tell that from only seeing the handle. I may have said it would if it did *all he claimed*. I saw nothing but the handle" (R., 128). De Kinder further testified that on that occasion he did not say to Gerstenberg that he (witness) would make a further and more detailed examination of the pump and a written report thereon; that witness told him to get an engineer" (R., 128).

It will be observed that Gerstenberg, who testified after hearing de Kinder's deposition read, recalled that de Kinder

used the expression that he was "very much impressed," and very ingeniously applied the expression to the pump itself, while as a matter of fact de Kinder said, not that, but that he was very much impressed with what Gerstenberg had told him about the pump.

The testimony of appellant and Gerstenberg, considered in connection with de Kinder's testimony, certainly presented a clear-cut question for the jury of whether Deis and Gerstenberg made the representation as testified to by the appellant, or whether they made it as testified to by Gerstenberg.

Reply to Appellees' Contentions as to Second and Third Assignments of Error.

The only other contention made in appellees' brief which it is desired to reply to here is that which relates to the second and third assignments of error based upon rulings of the trial court in excluding testimony offered by the plaintiff as to alleged statements made to him by Deis out of the presence and hearing of Gerstenberg. There were two such statements; one made by Gerstenberg in Patterson relating to the efficiency of the Deis pump over other pumps, and the second made by Deis in the lobby of the New Willard hotel when he exclaimed to Milson, "Come, we must get out of here quickly because there is Solomon over there and I do not want him to see you with me, because he came down here to close the transaction and expected to get the interest that we are negotiating for with you" (R., 48).

Appellees in their brief, at pages 55-56, say, (1) that the excluded statements of Deis differ in no respects from other statements which the plaintiff alleged were made by him and Gerstenberg in each other's presence and, therefore, the offer of these representations was at most a repetition only and their exclusion was in consequence not prejudicial to appellant; (2) that the testimony was not admissible upon the theory stated at the trial, namely, that the court might receive it accompanied by appropriate instructions to the

jury that it was evidence against Gerstenberg and not against the executors of Deis, because the action was to recover the entire sum paid by the appellant from both defendants jointly; and, (3) that the testimony was not admissible under section 1064, Code D. C.

(1) There can be no question that the statement made by Deis when in Paterson to the appellant was substantially the same as the representation made by Deis and Gerstenberg together in Washington, and, therefore, the testimony by the appellant as to the former statement would have been, if admitted, cumulative. But what was said by Deis to the appellant in the New Willard Hotel in Washington can be regarded in no sense as cumulative and had a strong bearing upon Deis' intention to commit a fraud upon the appellant. (2) It makes no difference upon what ground the remark made in the New Willard Hotel by Deis and Gerstenberg was offered; if it was competent evidence it should have been admitted, irrespective of the ground on which it was offered. But the record shows that it was offered "on the ground that any declarations made by Deis, although he is now deceased, are binding upon the defendant Gerstenberg, whether they are binding on Deis' estate or not" (R., 48). This offer was sufficiently broad to indicate that the offer was made as against both defendants or either. The case being one of fraud, the rule that wide latitude should be allowed in the admission of evidence in such case required its admission. The action was based upon the fraud of two men in procuring money from another. That fraud consisted in the making of false representations which induced such other person to part with his money to the men committing the fraud. If Deis alone had made the false representations concerning the stock owned by himself and Gerstenberg, and Gerstenberg had shared with him in the fruits of this fraud, Gerstenberg would have been as much liable as Deis. The representations made by Deis would have bound Gerstenberg on the theory that Deis in making the representations was acting for himself, and also as the agent of Gerstenberg. So, too, the declarations of one of the two wrong-doers, tending to show fraud in the trans-

action, are admissible against the other. Cases exactly in point are cited on pages 64-65 of the appellant's main brief.

(3) Aside from the admissibility, on the ground stated, of this testimony as to the declarations of Deis, now deceased, not made in the presence of Gerstenberg, offered by the appellant, it is plainly admissible not only on that ground, but also under the letter of section 1066 of the Code D. C. The only answer the appellees made to this latter contention is that "the alleged representations which were excluded were not claimed to have been made by Gerstenberg, the survivor, nor in his presence, nor with his privity."

If the section be examined it will be seen that this is no answer at all. It provides in effect that where any of the original parties to a contract or transaction are partners or other joint contractors, and some of them have died, any person with whom the contract or transaction was made or had shall not be incompetent to testify because of such death. Deis and Gerstenberg if not partners were certainly joint contractors and engaged in a joint transaction having for its object the obtaining of money from the appellant for stock which they owned. Deis is dead. He made certain statements or admissions to the appellant. The statute says that because of his death, the appellant, the person with whom the contract was made or transaction had, shall not be incompetent to testify as to what he said. Appellant offered to testify as to declarations made by one of the joint contractors, now deceased, and, as we read the statute, his testimony came within its very letter and should have been admitted.

It is again respectfully submitted that the judgment in this case should be reversed.

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